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Supreme Court of the United States

OCTOBER TERM, 1947

No. 160

JOHN DI BENEDETTO, *Petitioner,*

v.

THE UNITED STATES

No. 161

WAYLAND C. DORRANCE, *Petitioner,*

v.

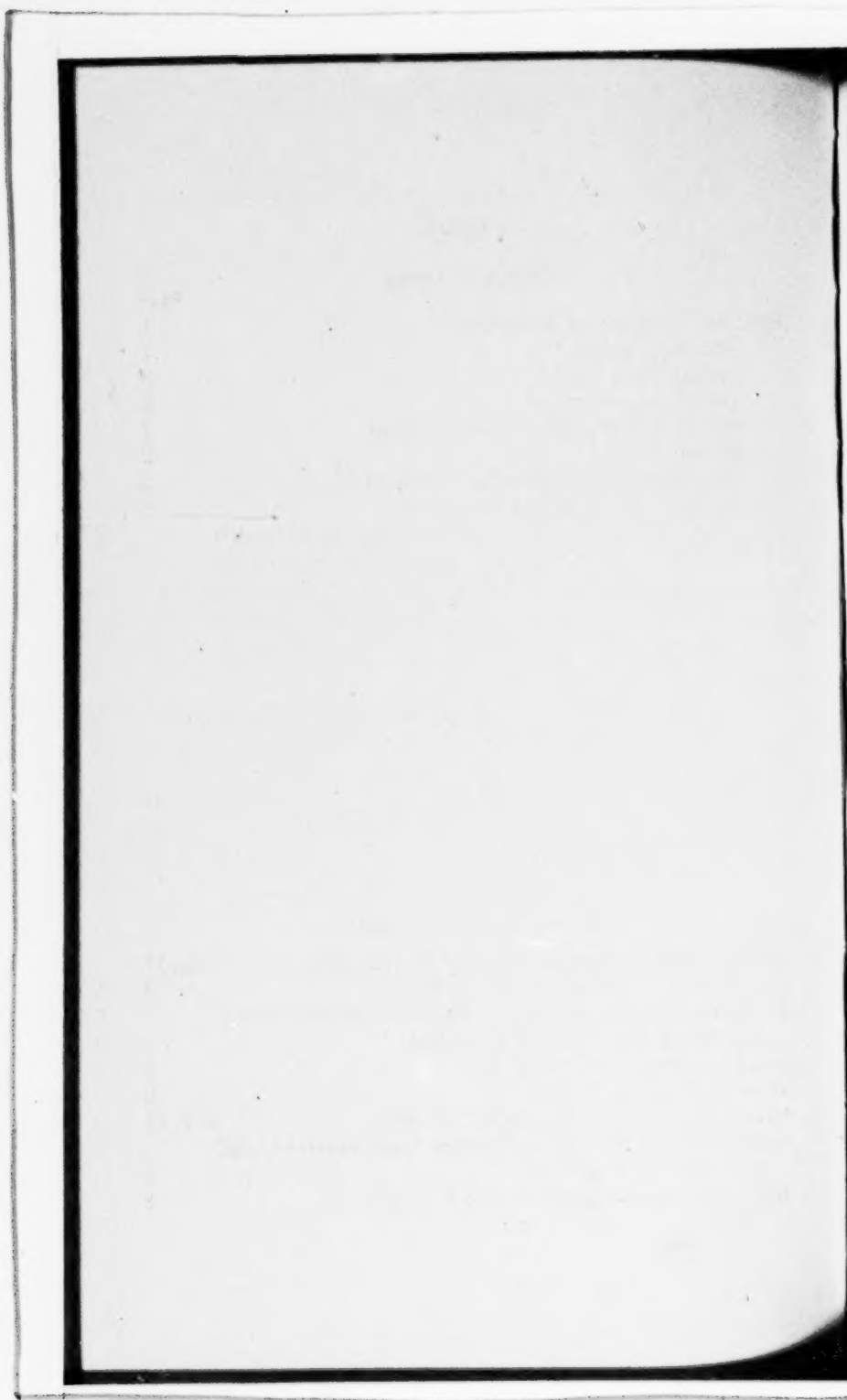
THE UNITED STATES

PETITION FOR WRITS OF CERTIORARI TO THE
COURT OF CLAIMS

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June 28, 1947.



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No. 161

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THE UNITED STATES

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

Petitioners pray that writs of certiorari issue to review the judgments of the Court of Claims (DiB. R. 13, D. R. 10) ¹ dismissing the petitions filed in that Court, entered on January 6, 1947.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Claims (DiB. R. 8-14) are not yet officially reported.

¹References to the DiBenedetto record will be preceded by "DiB." References to the Dorrance record by "D."

JURISDICTION

The judgments of the Court of Claims were entered on January 6, 1947 (DiB. R. 13, D. R. 10). A petition for rehearing which was timely filed was denied on April 8, 1947 (DiB. R. 13-14, D. R. 10-11). The jurisdiction of this Court is invoked under the provisions of Section 3(b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether the employees of the customs service may be required to work on legal holidays without extra compensation despite a statute requiring extra pay on "holidays."

STATUTES AND REGULATIONS INVOLVED

The essential statutes are the Act of February 13, 1911, Sec. 5, 36 Stat. 901, as amended by the Act of February 7, 1920, 41 Stat. 402, 19 U. S. C. § 267 (1940), granting to customs employees "two additional days pay for Sunday or holiday duty"; and the Joint Resolution of January 6, 1885, 23 Stat. 516, as subsequently amended, which defines "holidays" for employees of the type customs officers were when the 1911 Act was adopted. These statutes and the Tariff Act of June 17, 1930, Sec. 451, as amended, 19 U. S. C. § 1451 (Supp. 1946), are printed in the Appendix, *infra*, pp. 14-17. The relevant sections of the Customs Regulations of 1937 and 1943 are also printed in the Appendix, *infra*, pp. 17-19.

STATEMENT

The findings of fact of the Court of Claims are largely the same in each case, varying only with respect to the rate of pay of the petitioners and the number of holidays each worked. They may be summarized as follows:

Petitioners are citizens of the United States and residents of the State of New York. At the time these suits

were instituted, Di Benedetto had been in the Customs service for over 16 years and Dorrance for over 37 years. Both were in the service throughout the period here involved—i. e., January 1, 1942 through July 4, 1945. Di Benedetto received a base salary of from \$2,410 to \$2,600 a year plus certain added compensation not relevant here; and Dorrance received a base pay of \$2,800 to \$3,420 during the same period.

Beginning with New Year's Day, 1942, the Treasury Department required all of its employees to work on that holiday, and on Decoration Day, Armistice Day and Thanksgiving Day (DiB. R. 4, D. R. 4-5). In 1943 Washington's Birthday was added to the list (D. R. 5). On May 12, 1943, the Administrative Assistant to the President issued the following memorandum to the heads of the Executive Departments and Agencies (DiB. R. 5, D. R. 5):

"The necessity for maintaining maximum output in Government activities throughout the war period requires that days normally observed by the departments and agencies as holidays should, with the exception of Christmas, be considered as regular work days for the duration of the war."

And on May 26, 1943, W. R. Johnson, Commissioner of Customs, instructed Principal Officers of Customs as follows (DiB. R. 5, D. R. 6):

"In view of the necessity for maintaining maximum output during the war, and in conformity with the general Government policy, days normally observed as holidays, with the exception of Christmas, shall be considered as regular work days for the duration of the war. * * *"

This general policy of "not observing" holidays was continued for all holidays designated by federal statute

throughout the years 1943 and 1944, and until shortly before Labor Day in 1945.²

Each of the petitioners was assigned to and did report for work on a number of these national holidays to which these administrative orders referred; between them, they worked on all of them (DiB. R. 7-8, D. R. 8-9). The services, in each case, were performed at facilities for which, if any extra compensation was payable, payment would be chargeable to the facilities in accordance with the Customs extra compensation laws (*Ibid.*). The claims, in the case of each petitioner, are for services on national holidays declared to be regular work days by these orders (DiB. R. 8, D. R. 8).

On these facts the Court of Claims concluded, as a matter of law, that the petitions should be dismissed. The majority rightly held that the right to recovery depends on the definition of the word "holidays" in the Act of 1911 as amended. It held that there were two alternative definitions available, one that the word "holidays" meant certain legal holidays as defined elsewhere in the statutes, and the other that the word meant no specific and definite days, but rather those "days when their fellow Government employees were having the day off" (DiB. R. 11). It chose the latter definition. For the period before the President's order in May 1943, the majority found that the petitioners had not met the burden of proving what the practice was in the rest of the Government (DiB. R. 14). The dissenting judge believed that Congress had used the word "holidays" in "its commonly accepted sense," and hence that it meant the "legal public holidays" (DiB. R. 12-13).

² In a Bureau Circular Letter dated August 27, 1945, the Commissioner of Customs directed: "Labor Day, September 3, 1945, shall be observed as a holiday in the Customs Service."

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

(1) In holding that the word "holidays" as used in the Customs extra compensation laws meant for customs employees "days when their fellow Government employees were having the day off."

(2) In failing to hold that the word "holidays" as used in the Customs extra compensation laws meant the "legal public holidays" declared by Congress in other statutes.

(3) In dismissing the petitions.

REASONS FOR GRANTING THE WRITS

I

THE COURT OF CLAIMS HAS CONSTRUED A STATUTE IN FLAT VIOLATION OF ANOTHER STATUTE; IN CONFLICT WITH ITS OWN PLAIN MEANING; IN CONFLICT WITH ITS LONG STANDING ADMINISTRATIVE INTERPRETATION; AND IN CONFLICT WITH OTHER GOVERNMENT WAGE POLICY.

No one in this case questions the power of the Customs Service officials to require extra work of their employees on legal holidays "in view of the war" or for any other reason. The only issue is whether, when holiday work is required, holiday compensation must be paid. Petitioners, relying on the language of the Customs extra pay laws dating from 1911—that extra compensation shall be payable on "Sundays or holidays" (Appendix, pp. 17-19)—contend that "holidays" included the legal holidays during the war just as they did before the war. The Government, on the other hand, successfully contended below that the holidays on which petitioners worked ceased to be holidays because others also worked on those days.

The principal statute involved was before this Court as recently as *United States v. Myers*, 320 U. S. 561 (1944). In that opinion the Court comprehensively outlined the history of the statutes dealing with the compensation of customs employees. Customs employees were originally hired on a per diem basis. It was early recognized that frequently ships arriving on Sundays and holidays could wait for unloading until the next day, and that the hardship on the Customs employees of giving up those holidays was such that it was reasonable to ask the shippers to pay the customs employees themselves for holiday services. The system of bonus payments under such circumstances was begun in 1911 and the rate payable was made mandatory in 1920. Act of February 7, 1920, c. 61, 41 Stat. 402; *United States v. Myers*, *supra*, at 568 *et seq.*

The practical consequence of the decision below is to give the customs employees no additional compensation whatsoever for work on legal holidays during the war. We contend that, in the light of the prevailing statutes and executive orders, this is in conflict with the controlling acts; with administrative interpretation; and with other Government wage policy.

1. The decision that the word "holidays" in the Act of 1911, as amended, does not include the specific legal holidays, is in flat violation of the Joint Resolution of January 6, 1885, as amended (Appendix, p. 17). That Joint Resolution provided that certain specified employees not relevant here, "and all other per diem employees of the Government on duty at Washington or elsewhere in the United States, shall be allowed the following holidays, to wit: The first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, and such days as may be designated by the President as days for national thanksgiving." In 1887 Memorial

Day was added to the list. The Joint Resolution was repealed in 1938. Act of June 29, 1938, c. 818, Sec. 2, 52 Stat. 1247.

This statute thus defined "holiday" to include certain named holidays. If applicable in this case as a definition of the word "holidays" in the Act of 1911 as amended, it would necessarily require reversal of the judgment below, which denies that there are any definite and specified holidays for customs workers. This was, of course, recognized by the court below, which distinguished the 1885 statute thus:

"This legislation has not, of course, any direct application to the plaintiff, who is paid on a per annum basis, *since it is limited to per diem employees*" (DiB. R. 9).

The court below, in making this assertion, overlooked the fact that when the Act of 1911 and the 1920 amendment were passed, customs employees *were* per diem employees. They remained per diem employees until 1928.³ Congress was thus not careless in failing to define "holiday" in the 1911 Act because there was a controlling definition outstanding which gave the word "holiday" a categorical and specific meaning which is the exact opposite alternative to that chosen by the court below. As most recently reenacted after the *Myers* decision of this Court the word "holiday" thus clearly continues to mean the legal holidays as currently defined by Congress.⁴

2. Even were the 1885 Act not a controlling definition, the prevailing meaning of "holiday" as used by Congress in every other context would require that the word as used in 1911 meant the legal holidays.

Each of the eight holidays for which petitioners claim

³ *United States v. Myers*, 320 U. S. 561, 568, n. 12 (1944).

⁴ See Act of June 3, 1944, 58 Stat. 269, adding proviso to Section 1451 of the Tariff Act of 1930 (Appendix pp. 15-17).

compensation⁵ has been designated by Congress as "a legal public holiday to all intents and purposes" (Act of December 26, 1941, 55 Stat. 862, 5 U. S. C. § 87b (Supp. 1946) (*Italics Supplied*). This 1941 enactment was only the latest in a series of statutes which had added new national legal holidays to the list. By the Act of June 28, 1894 (28 Stat. 965 U. S. C. § 87 (1940), Congress had added Labor Day as a "legal public holiday * * * in the same manner as Christmas, the 1st day of January, the 22nd day of February, the 30th day of May and the 4th day of July are now made by law public holidays." When, in 1911, Congress enacted the basic Customs extra compensation law providing for extra compensation for "Sunday or holiday" service, there is, as the dissenting judge below pointed out, "no reason to think that Congress in 1911 understood the word 'holidays' to have a different meaning from what they understood it to mean in 1894" (DiB. R. 13).

The Customs extra compensation law and the several laws creating "legal public holidays" are *in pari materia*. *Reiche v. Smythe*, 13 Wall. 162, 165 (1871); *Stairs v. Peaslee*, 18 How. 521, 526 (1855); *Northern Pacific R. R. v. Musser-Sauntry Land, Logging & Mfg. Co.*, 168 U. S. 604, 608 (1897). See *Greenleaf v. Goodrich*, 101 U. S. 278, 281 (1879).

The interpretation of the court below reads an implied exception into every existing statute defining legal holidays. For example, no longer is Labor Day a "legal public holiday"; it is a "legal public holiday" except that in the Customs service it is not when, in the judgment of the administrative heads of that service, everyone ought to work. The majority below thought that Congress probably would have so intended. We think that plainly wrong.

⁵ January 1, February 22, May 30, July 4, the first Monday in September, November 11, the fourth Thursday in November, and December 25.

Congress said that holiday extra compensation was to be paid to certain customs officers and employees for certain types of services, because those employees were frequently called upon to perform these services on holidays. There is not the slightest suggestion in the entire legislation that Congress intended to deny this extra compensation on any holiday on which, for some reason, others also were called upon to work. If we are to indulge in assumptions as to the minds of Congress in 1911, the far more likely one is that Congress intended to compensate these employees for the sacrifice of a holiday, and would consider, when it came up, whether and how much to compensate others who might have to make the same sacrifice.

In the absence of a special definition, words, whether in the Constitution, *United States v. South Eastern Underwriters*, 322 U. S. 533, 539 (1944), or in statutes, *Western Union v. Lenroot*, 323 U. S. 490, 503 (1945), are ordinarily defined in terms of common parlance. As the Court said of a statutory phrase in the latter case, "These are terms of ordinary speech and mean what they mean in ordinary intercourse in this context." So here. As the dissenting judge below said:

"The man on the street, anyone, would tell you that Christmas was a holiday, so also the 4th of July, and others. If you hired a man and told him that he would not have to work on holidays, he would understand, I am quite sure, that he would not have to work on those days. . . ." (DiB. R. 12).

It may be safely assumed that in the 30-odd years he had been with the Customs service, petitioner Dorrance never believed that New Year's Day was not a holiday before 1942.

3. The Customs Regulations have for many years been based on petitioners' interpretation. The 1937 Regulations

stated that the term "holidays" in the extra compensation provisions "shall include only national holidays" and listed the six holidays then designated by statute. See Article 1243 (Appendix, p. 17). Armistice Day was added shortly after it had been designated by statute as a "legal public holiday." T. D. 49588, June 6, 1938. The 1943 Regulations were to the same effect. Section 1.8, Note 7; Section 24.16 (Appendix, pp. 18-19). Since 1937, Congress has considered and amended the extra compensation provisions of the customs laws at least twice (Act of June 25, 1938, c. 679, 52 Stat. 1082; Act of June 3, 1944, c. 233, 58 Stat. 269), with no indication of any dissent from the administrative interpretation of "holidays." The definition therefore may be deemed accepted by Congress as correct.* The court below disregarded these Regulations as "merely instructions to district officers and employees" (DiB. R. 12), and open to any administrative change. We know of no warrant for such a limitation on the doctrine of ratification.⁷

4. The decision below interprets the Presidential order establishing a uniform holiday work policy in conflict with the general governmental policy on holiday bonus pay.

* The extent of the modification from prior practice is shown by the modification in the Regulations in December 1944, after litigation had already begun (See *DiBenedetto v. Morgenthau*, 148 F. (2d) 223 (App. D. C. 1945, *certiorari dismissed as moot*, 326 U. S. 686 (1945) and after the last amendment to the customs extra compensation laws in June, 1944. The 1944 Regulation states: "The term 'holiday' shall include only days on which Customs employees generally are not required to work and which are usually observed as national holidays." Section 24.16.

⁷ The petitioners do not seek recovery for any work done on the Monday following a legal public holiday which falls on Sunday. The majority below argued, however, that petitioners' contentions would deprive them of that compensation. Plainly, the argument is without substance; Monday holidays were directed by an Executive Order which was in effect prior even to the 1911 Act. Executive Order No. 1076 (quoted in 21 COMP. GEN. 901, 902). That Order may also be taken as fully ratified and confirmed by Congress.

Under the decision below, Customs Service employees receive no added compensation whatsoever for holiday work. Executive Order 9240, dealing with holiday compensation for non-governmental workers under union contracts with holiday pay clauses, specifically allowed time and one-half compensation for certain holidays. That order is by its terms inapplicable to Government employees, but we think it significant all the same. We cannot believe that the White House order requiring Government employees to work on holidays but making no mention of compensation is to be construed as infinitely harsher than an Executive Order dealing with the precise problem of holiday wages in industry.

II

THE DECISION OF THE COURT OF CLAIMS IS IN PROBABLE CONFLICT WITH THE DECISION IN MYERS V. UNITED STATES, 320 U. S. 561, 321 U. S. 750.

The *Myers* case involved the customs officers and employees at Detroit, Michigan. At that port it was shown that for years the holidays now in question had been considered regular work days for all purposes by the administrative orders of the Treasury Department. Both there, and in the instant cases, the Treasury declined to pay extra compensation in accordance with the statute. Here the theory is plainly stated—that if enough Customs officers and employees are assigned to regular hours of duty on a holiday, it *ipso facto* ceases to be a holiday within the meaning of the Customs laws. In the *Myers* case the issue was not so sharply drawn, but the argument was made that when a holiday is a “regular tour of duty”—worked by many people at the port—it was not a holiday for purposes of extra compensation. The position was explicitly rejected by this Court (321 U. S. at 751):

"The proviso of Section 5 does not give the Collector of Customs authority to make assignments which deprive inspectors of their Sunday and holiday pay. It authorizes adjustment of hours but specifically forbids alteration of overtime pay."

The conclusion of the court below, that by assigning all Customs employees, instead of just those at Detroit, to work on New Year's Day, the Treasury can avoid the statute, is, we submit, an attempt to read into the decision of this Court in the *Myers* case a qualification that is not there. We think the correct rule, which is embodied in the *Myers* decision, is that more elaborately stated by the Comptroller General in 1943 in connection with the Postal Service (22 Comp. Gen. 1057, 1059):

"Presidential or administrative orders requiring work on legal holidays during the war emergency do not and cannot change the status of such holidays for the purpose of applying statutes and regulations having the force and effect of law granting rights and benefits on the basis of the holidays."

III

THE DECISION BELOW IS IMPORTANT

We appreciate that the issue here may seem trifling to this Court. In terms of dollars, it is true that the claims are small; an average of about \$200 is involved in each case; although that is over 5 percent of a year's pay for these men. These two cases, however, are stipulated to be test cases in 61 additional cases on file and pending in the Court of Claims. The same issue is involved in an additional 300 cases which are not included in the stipulation. There are also a further group of officers and employees numbering about 300 who are seeking the same relief, but have withheld from counsel authority to file petitions pending

these test cases, since the statute of limitations has not yet begun to run. There are, in other words, at least 650 cases which depend on the decisions in these cases. Of course, since no court other than the Court of Claims has jurisdiction of such claims, *cf. DiBenedetto v. Morgenthau*, 148 F. (2d) 223 (App. D. C.), *certiorari dismissed as moot*, 326 U. S. 686 (1945), no conflict, such as might be expected with such a number of claims in different courts, can ever develop.

CONCLUSION

Writs of certiorari should be granted. We submit further that this may be an appropriate case for summary reversal on this petition.

Respectfully submitted,

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APPENDIX

PERTINENT PROVISIONS OF CUSTOMS STATUTES

1. *ACT OF FEBRUARY 13, 1911, C. 46, SEC. 5, 36 STAT. 901, AS AMENDED BY THE ACT OF FEBRUARY 7, 1920, C. 61, 41 STAT. 402, 19 U. S. C. 267 (1940).*

SEC. 267. COMPENSATION FOR OVERTIME SERVICES; FIXING WORKING HOURS. The Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury. Such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. In those ports where customary working hours are other than those hereinabove mentioned, the collector of customs is vested with authority to regulate the

hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this section shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.

2. *TARIFF ACT OF JUNE 17, 1930, C. 497, SEC. 451, 46 STAT. 715, AS AMENDED BY THE ACT OF JUNE 25, 1938, C. 679, SEC. 9, 52 STAT. 1082, AND BY THE ACT OF JUNE 3, 1944, C. 233, SEC. 1, 58 STAT. 269, 19 U. S. C. 1451 (Supp. 1946).*

SEC. 1451. UNLADING ON SUNDAYS, HOLIDAYS, OR AT NIGHT ; EXTRA COMPENSATION.—Before any such special license to unlade shall be granted, the master, owner, or agent, of such vessel or vehicle shall be required to give a bond in the penal sum to be fixed by the collector conditioned to indemnify the United States for any loss or liability which might occur or be occasioned by reason of the granting of such special license and to pay the compensation and expenses of the customs officers, and employees assigned to duty in connection with such unlading at night or on Sunday or a holiday, in accordance with the provisions of sections 261 and 267 of this title. In lieu of such bond the owner, or agent, of any vessel or vehicle or line of vessels or vehicles may execute a bond in a penal sum to be fixed by the Secretary of the Treasury to cover and include the issuance of special licenses for the unlading of vessels or vehicles belonging to such line for a period of one year from the date thereof. Upon a request made by the owner, master, or person in charge of a vessel or vehicle, or by or on behalf of a common carrier or by or on behalf of the owner or consignee of any merchandise or baggage, for overtime services of customs officers or employees at night or on a Sunday or holiday, the collector shall assign sufficient customs officers or employees if available to perform any such services which may lawfully be performed by them during regular hours of business, but only if the person requesting such services gives a bond in a penal sum to be fixed by the collector, conditioned to pay the compensation and expenses of such customs officers and employees, who shall be entitled to rates of compensation fixed on the same basis and payable in the same manner and upon the same terms and conditions as in the case of customs officers and employees assigned to

duty in connection with lading or unlading at night or on Sunday or a holiday. Nothing in this section shall be construed to impair the existing authority of the Treasury Department to assign customs officers or employees to regular tours of duty at nights or on Sundays or holidays when such assignments are in the public interest: *Provided*, That the provisions of this section, sections 1450 and 1452 of this title, and the provisions of section 267 of this title, insofar as such section 267 of this title requires payment of compensation by the master, owner, agent, or consignee of a vessel or conveyance, shall not apply to the owner, operator, or agent of a highway vehicle, bridge, tunnel, or ferry, between the United States and Canada or between the United States and Mexico, nor to the lading or unlading of merchandise, baggage, or persons arriving in or departing from the United States by motor vehicle, trolley car, on foot, or by other means of highway travel upon, over, or through any highway, bridge, tunnel, or ferry. At ports of entry and customs stations where any merchandise, baggage, or persons shall arrive in or depart from the United States by motor vehicle, trolley car, on foot, or by other means of highway travel upon, over, or through any highway, bridge, tunnel or ferry, between the United States and Canada or between the United States and Mexico, the collector, under such regulations as the Secretary of the Treasury may prescribe, shall assign customs officers and employees to duty at such times during the twenty-four hours of each day, including Sundays and holidays, as the Secretary of the Treasury in his discretion may determine to be necessary to facilitate the inspection and passage of such merchandise, baggage, or persons. Officers and employees assigned to such duty at night or on Sunday or a holiday shall be paid compensation in accordance with existing law as interpreted by the United States Supreme Court in the case of the *United States v. Howard C. Myers* (320 U. S. 561); but all compensation payable to such customs officers and employees shall be paid by the United States without requiring any license, bond, obligation, financial undertaking, or payment in connection therewith on the part of any owner, operator, or agent of any such highway vehicle, bridge, tunnel or ferry, or other person. As used in this

section, the term "ferry" shall mean a passenger service operated with the use of vessels which arrive in the United States on regular schedules at intervals of at least once each hour during any period in which customs service is to be furnished, without reimbursement as above provided.

HOLIDAY STATUTE OF 1885

1. *THE JOINT RESOLUTION OF JANUARY 6, 1885, 23 STAT. 516, AS AMENDED BY THE JOINT RESOLUTION OF FEBRUARY 23, 1887, 24 STAT. 644, 5 U. S. C. § 86 (1940).*

The employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The 1st day of January, the 22d day of February, the day of each year which is celebrated as "Memorial" or "Decoration Day," the 4th day of July, the 25th day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days.

CUSTOMS REGULATIONS

1. *CUSTOMS REGULATIONS (1937), PROMULGATED AUGUST 23, 1937, 2 FED. REG. 1444 (1937).*

Overtime Service

Art. 1243. Definition of "Night" and "Holiday."—For the purpose of computing extra compensation the word "night" will be construed to mean the time from 5 p. m. to 8 a. m. and the term "holiday" shall include only national holidays, viz, January 1, February 22, May 30, July 4, the first Monday in September, Thanksgiving Day (when designated by the President), and December 25, and such other days as may be made national holidays.

Art. 1245. Sundays and Holidays.—(a) For authorized services performed on Sundays and holidays between 8

a. m. and 5 p. m., customs officers and employees shall be entitled to 2 days' pay in addition to their regular compensation.

(b) Officers and employees who are paid on a per diem basis 'when employed' will receive no other compensation for services rendered by them on Sundays and holidays than that allowed under the overtime act.

(c) If overtime service is performed on Sundays or holidays in connection with the unloading or other authorized service for two or more vessels or vehicles the 2 days' extra compensation shall be prorated between the different vessels or vehicles.

Hours of Business and Service

Art. 1461. Hours of Business.—(a) Customs offices shall be open between the hours of 9 a. m. and 4:30 p. m. on all days of the year, except Saturdays, Sundays, and national holidays, and on Saturdays, except national holidays, from 9 a. m. to 1 p. m., unless a variation in these hours is necessitated by local conditions and is approved by the Commissioner of Customs. So far as the transaction of public business will permit, customs employees may be excused on State holidays: *Provided, however,* That no such employee shall be excused from performing 4 hours' work, exclusive of time for luncheon, on Saturdays, without being charged the time absent, because of any State law granting part holidays on Saturdays. * * *

(b) The national holidays are January 1, February 22, May 30, July 4, the first Monday in September, Thanksgiving Day (when designated by the President), and December 25. If a holiday falls on Sunday the following day will be observed.

2. CUSTOMS REGULATIONS (1943), EFFECTIVE JULY 1, 1943, 19 CODE FED. REGS. §§ 1.8, 24.16 (CUM. SUPP. 1944).

1.8 Hours of Business.—(a) Except as hereinafter specified, each customs office shall be open for the transaction of general customs business between the hours of 8:30 a. m.

and 5 p. m. on all days of the year except Saturdays, Sundays, and national holidays.⁷ (As of 1st Rev. Jan. 1946.)

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24.16 Overtime Services; Overtime Compensation; Rate of Compensation.—(a) Customs services for which overtime compensation is provided for by section 5 of the Act of February 13, 1911, as amended by the Act of February 7, 1920 (19 U. S. C. 267), or section 451, Tariff Act of 1930, as amended, shall be furnished only upon compliance with the requirements of those statutes for applying for such services and giving bonds to secure the payment of overtime compensation. Such overtime compensation shall be collected by the collectors from the parties for whom the services are rendered. Customs officers or employees shall not receive overtime compensation for services performed on regular tours of duty at night or on Sundays or holidays.

.

(f) For the purpose of computing overtime compensation, the word 'night' shall be construed to mean the time from 5 p. m. to 8 a. m., and the term "holiday" shall include only national holidays.⁸ (Before 1st Rev. Jan. 1946; compare revision set out in Note 6 of Brief, *supra*.)

⁷ The national holidays are January 1, February 22, May 30, July 4, the first Monday in September, November 11, the fourth Thursday in November, and December 25. If a holiday falls on Sunday, the following day will be observed. (E. O. No. 1076, May 22, 1909.) Other days may be designated as national holidays by Executive order of the President.

⁸ National holidays are: January 1, February 22, May 30, July 4, the first Monday in September, November 11, the fourth Thursday in November, and December 25.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 160

JOHN DI BENEDETTO, PETITIONER

v.

THE UNITED STATES

No. 161

WAYLAND C. DORRANCE, PETITIONER

v.

THE UNITED STATES

**ON PETITION FOR WRITS OF CERTIORARI TO THE COURT
OF CLAIMS**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Claims (DiB. R. 8-13, 14; D. R. 10-11)¹ have not yet been reported.

¹ References to the DiBenedetto record will be preceded by the notation "DiB."; to the Dorrance record, by "D."

JURISDICTION

The judgments of the Court of Claims were entered on January 6, 1947 (DiB. R. 13; D. R. 10). Motions for new trials, filed by petitioners on March 4, 1947, were overruled on April 7, 1947 (DiB. R. 13-14; D. R. 10-11). The petition for writs of certiorari was filed June 28, 1947. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

The Act of February 13, 1911, as amended, provides for the payment of extra compensation to certain customs employees when required to work on "holidays". Did the Court of Claims err in denying such extra compensation for work performed on days which, though ordinarily observed as holidays in peace-time, were designated during the war, by Presidential directive and administrative order, as regular work days?

STATUTE INVOLVED

The Act of February 13, 1911, c. 46, Sec. 5, 36 Stat. 901, as amended by the Act of February 7, 1920, c. 61, 41 Stat. 402 (19 U. S. C. 267) reads as follows:

the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to

remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or *holidays*, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: *Provided*, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether

the actual lading, unlading, receiving, delivery, or examination takes place or not.
 * * * *Provided further*, That in those ports where customary working hours are other than those hereinabove mentioned, the collector of customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed. [Italics added.]

STATEMENT

On December 31, 1941, an order was issued by direction of the Secretary of the Treasury, requiring all Treasury Department employees, "in view of the war," to work on New Year's Day, 1942 (DiB. R. 4, D. R. 4). Additional orders issued from time to time thereafter also made Washington's Birthday, Decoration or Memorial Day, Independence Day, Labor Day, Armistice Day, and Thanksgiving Day in some or all of the years 1942 to 1945, regular work days for the Treasury employees (DiB. R. 4-7, D. R. 4-7). This governmental policy was embodied in 1943 in several directives issued at the direction of the President to the executive departments and agencies (DiB. R. 4-5, 5-6, D. R. 5, 6-7).²

² The President's directive of May 12, 1943, read, in part: "The necessity for maintaining maximum output in Govern-

Throughout this period, when such holidays were treated as regular work days for the Government service generally (January 1, 1942, through July 4, 1945), each of the petitioners was an Inspector of Customs and, as such, a *per annum* employee of the United States. In that capacity, each was assigned to work on a number of those days and did perform services which, if the days had had the status of holidays within the provisions of the Act of February 13, 1911, as amended, would have entitled him to extra compensation, payment of which would have been for the account of and chargeable to the carriers served. (DiB. R. 4, 8; D. R. 4, 9). Petitioners, however, though they received their base annual salaries, as augmented by the War Overtime Pay Acts (Act of December 22, 1942, c. 798, 56 Stat. 1068; Act of May 7, 1943, c. 93, 57 Stat. 75, 50 U. S. C. App., Supp. V, 1401 *seq.*), and extra compensation for certain holiday and overtime services not here

ment activities throughout the war period requires that days normally observed by the departments and agencies as holidays should, with the exception of Christmas, be considered as regular work days for the duration of the war." (DiB. R. 5, D. R. 5.) On December 17, 1943, this directive was reaffirmed, the President's Administrative Assistant noting: "There is full realization of the long hours which Federal employees are continuously working in the interest of the war effort and of the fact that holiday work is performed by Federal employees without additional compensation. The policy with respect to work on holidays will be reconsidered at the earliest possible moment that progress in the war will permit." (DiB. R. 6, D. R. 7.)

involved (DiB. R. 3-4; D. R. 3), received no extra compensation for their services on the days referred to above (DiB. R. 8; D. R. 9).

The Court of Claims, finding these to be the facts, concluded, as a matter of law, that petitioners were not entitled to recover and that their petitions should be dismissed (DiB. R. 8; D. R. 9-10). Reading the term "holidays" in the Act of February 13, 1911, to mean only those "days that were holidays in fact, days on which their fellow Government employees were not required to work" (DiB. R. 11), the court, in an opinion by Judge Madden, held that Congress had not intended that extra compensation be awarded customs employees for work on any day "which, though named in a Federal statute as a holiday for certain other employees, was a day on which government employees generally, and particularly those who like the * * * [petitioners] were paid an annual salary, were working without extra compensation * * *" (*Ibid.*). Judge Whitaker, dissenting, urged that Congress had intended that the term "holidays" be read in "its commonly accepted sense" as embracing all "legal public holidays." (DiB. R. 12-13).

ARGUMENT

This suit involves a narrow question as to the construction of the term "holidays" as it appears without definition in a 1911 statute providing extra compensation for holiday work of customs

employees. The Court of Claims has read the provision as requiring extra compensation for services only on such days as are not regularly worked by Government employees. We submit that the court's construction is reasonable and consonant not only with the letter of the 1911 Act but also with the Congressional purpose in enacting the statute. Nor is it, as petitioners suggest (Pet. 11-12), in conflict with prior decisions of this Court. Further review of the decision below would therefore seem unwarranted.

1. There is no conflict between the ruling below and this Court's decision in *United States v. Myers*, 320 U. S. 561, 321 U. S. 750, which also involved the construction of the 1911 Act. The question there was not whether certain days were "holidays" for purposes of the statute, but whether customs inspectors were entitled to extra compensation for work performed on days concededly holidays, where such work was done within a regular 44-hour week. The Court held that extra compensation had to be paid for work done on holidays "without regard to * * * whether such services are additional to a regular weekly tour of duty" (320 U. S. at 574).³ There

³ The Court, however, agreed with the Government that the 1911 Act did not require extra compensation for night work except where such work was performed as overtime, that is, in addition to a regular tour of 9 hours (including one hour for food and rest) in any one day. See 320 U. S. at 573-574.

was neither holding nor implication on the issue here involved, whether extra compensation is required for days which, though normally holidays, were regular working days for the entire Government service at the time the customs services were performed.

2. There can be little question as to the underlying policy of the statute here involved. In contrast to ordinary Government employees, customs inspectors have constantly been subjected to abnormal and long working hours as a result of the common practice, prevalent since the early days of the 19th century, of permitting the unloading of vessels at night and on Sundays and holidays. An effort to alleviate this condition was first made in the Act of March 3, 1873, 17 Stat. 579 (see Cong. Globe, 42d Cong., 3d Sess., pp. 2009, 2205), which, as later extended (Sec. 25 of Act of June 26, 1884, 23 Stat. 53, 59; Act of June 30, 1906, 34 Stat. 633), was eventually replaced by the Act of February 13, 1911, 36 Stat. 901. The 1911 Act entrusted to the Secretary of the Treasury the fixing of the "reasonable rate of extra compensation for night services" to be charged to the carriers and paid to the employees, and in 1920, the working day was reduced to 8 hours and the extra compensation theretofore payable for night services was made payable instead for "overtime services of * * * customs officers and employees who may

be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays." (Act of February 7, 1920, 41 Stat. 402).

Throughout the history of this legislation, the dominant fact was that customs employees, because of the character of their jobs and the demands of the industry they served, were being required to work at such times and on such days as the rest of the Government workers were not. By providing extra compensation for such extraordinary work, Congress sought, on the one hand, to deter the shipping and transportation companies from compelling overtime and holiday work and, on the other, to award extra compensation to such customs employees as were nevertheless required to render such services. Certainly there is nothing to show that Congress intended to prefer the customs employee to other Government workers by affording him two additional days' pay on those days when all others were required to serve without any additional compensation. To compel a construction producing so incongruous a result, petitioners must obviously sustain a sizable burden. This they have failed to do.

The Joint Resolution of January 6, 1885, on which petitioners rely (Pet. 6-7), is plainly irrelevant. That statute, before it was repealed in 1938, designated certain specific holidays for

per diem employees of the Government, but it provided that they were to receive the same pay for such holidays as on other days; clearly, then, it had no significance for the *per diem* customs employees who, by the 1911 Act, as amended, were accorded triple pay for holiday work.⁴ Nor is there any force in petitioners' suggestion that the courts alternatively accept as binding in their construction of the 1911 Act, the specification of holidays in the general statutes designating certain days as legal public holidays (see Pet. 7-8). There is no showing that the purposes of the general laws and the 1911 statute are related. A particular word in one statute frequently means something else in another statute (*Puerto Rico v. Shell Co.*, 302 U. S. 253, 257-259) or even in another part of the same statute (*Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 433-434; *Helvering v. Stockholms etc. Bank*,

⁴In any event, whatever logic there may have been in importing the definition of the Joint Resolution into the 1911 Act prior to 1928, when the customs inspectors were made *per annum* employees (Act of May 29, 1928, 45 Stat. 955, 19 U. S. C. 6a), there was none thereafter; the legislation peculiarly made applicable to *per diem* employees thereupon became no longer applicable in its purposes or design to the *per annum* customs employees. It should be noted, moreover, that even before they were formally transferred to the rolls of *per annum* employees, in 1928, customs inspectors "were paid for 365 days * * * thus receiving the equivalent of an annual salary." *United States v. Myers*, 320 U. S. 561, 568, n. 12.

293 U. S. 84, 86-88). And the term "holidays" may equally vary in purport from one context to another. See *Lehigh Valley R. Co. v. State of Russia*, 21 F. 2d 396, 404 (C. C. A. 2).

That the Customs Regulations had for years designated certain days as holidays, as the court below correctly held, "did not prevent the department from following the practice of the rest of the Government with regard to the nonobservance of holidays which had been observed before the war" (DiB. R. 12). Nor are petitioners aided by resort to "common parlance" (Pet. 9). Surely, in view of the evident policy of the statute, it quite accords with common parlance to read "holidays," so far as these customs employees were concerned, as not including those days during the war period worked by Government workers generally (and, indeed, probably by the great majority of persons engaged in private employment). To read the term otherwise, as petitioners urge, so as to embrace days not actually Government holidays, and thereby to discriminate by substantial extra payments in favor of a small class of Government workers and against the large majority of employees in the Federal service would, in our view, produce "an unreasonable result, 'plainly at variance with the policy of the legislation as a whole'" (*United States v. Rosenblum Truck Lines*, 315 U. S. 50, 55).

CONCLUSION

It is respectfully submitted that the petition for writs of certiorari should be denied.

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AUGUST 1947.